Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-1 09-780

In The

Supreme Court of the United States

KENNETH M. PEDELEOSE,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH M. PEDELEOSE, Pro Se
5252 Barrett Pkwy., SW #13
Marietta, GA 30064
(770) 425-4718

QUESTION PRESENTED

Whether a whistleblower must have definitive knowledge that a law has been violated in order for their disclosure to be protected under 5 U.S.C. § 2302(b).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kenneth M. Pedeleose, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is unreported. App.1. The rulings of the Merit Systems Protection Board are unreported. App.12, 36.

JURISDICTION

The Federal Circuit filed its opinion on August 6, 2009. The Court granted an extension of time to file the petition for writ of certiorari to December 31, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 2302 provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of –

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences –

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences –

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of –

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

> (B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or
>
> (12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title. This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

STATEMENT

The case at bar crystallizes the quandary of the federal employee who, as part of his or her job duties, identifies governmental waste, fraud or illegality and suffers retaliation at the hands of a governmental authority for his duty to report.

Since 1978, Congress has observed how whistleblowers protect the country:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss.

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

S. Rep. No. 95-969, at 8 (1978).

Since the court of appeals failed to heed Congress' command to protect whistleblowers and because such protection is vitally important to the efficient running of the country, review is warranted.

1. Petitioner is a well known whistleblower in the Department of Defense ("DOD"). In 2002, petitioner and two colleagues told Congress that Lockheed Martin was trying to overcharge the Pentagon for work on the C-5 and C-130 transport aircraft programs. Petitioner and colleagues stated that Defense Contract Management Agency ("DCMA") and Air Force managers were reluctant to confront the defense contractor about excessive costs. The DOD Inspector General Office

(DOD IG) concluded that the C-130J was a troubled aircraft and issued an audit report of findings on July 23, 2004.

After then-Defense Secretary Donald Rumsfeld ordered the termination of C-130J airplane production, petitioner wrote a 2005 report to congressional offices and then DOD IG Joseph Schmitz that the Air Force and Lockheed Martin were dramatically overestimating the costs of canceling the program in order to ensure that aircraft production continued.

The Pentagon inspector general later corroborated the essence of petitioner's claims when it concluded that the Air Force may have overstated the cost of canceling the C-130J by up to $1.1 billion.

Petitioner was not done. He and two other colleagues wrote in a 2002 report that Lockheed Martin sought to bill the Air Force $714 per rivet and $5,217 per inch-long bracket in the company's C-5 production program, even though the government-recommended price for the rivet was $53 and $258 for the bracket. DCMA successfully fought the overcharges and the government ultimately wasn't billed for the excessive costs.

2. Petitioner was employed as an industrial engineer at the DCMA, Lockheed Martin Marietta ("LMM") facility. In May 2005, petitioner issued a report to the Inspector General of the Department of Defense ("IG") and Congressional offices outlining allegations of a cover-up action of the Department of Defense. The 52-page report was titled "Cover-up in

the Department of Defense." Petitioner reported in detail numerous unethical acts and information regarding activity including price gouging, defective equipment, criminal vulnerability and a host of other disclosures.

From June 15, 2005 through July 7, 2005, petitioner made disclosures to the IG regarding the unlawful termination of a DCMA employee, Susan VanDerbeck. Petitioner issued a 32-page report outlining in detail falsification of documents, abuse of authority by Colonel Nicole Plourde (Commander), and a host of other disclosures to the IG. Petitioner learned that other firings were planned in the agency, including that of Gerry Sawyer, a witness to petitioner's allegations in a detailed written disclosure to the DOD IG in February 2005 that involved Criminal Vulnerability, Fraud, and Collusion to Commit Fraud among other allegations. In May 2005 Petitioner was informed that the disclosure was forwarded to DOD authorities for action they deemed appropriate.

Petitioner informed Ms. Sawyer that there were rumors she would soon be fired. Ms. Sawyer quickly informed her supervisor that she decided to retire in order to avoid being fired, and she submitted retirement papers. When DCMA LMM Commander Colonel Nicole Plourde learned of Sawyer's pending retirement and the reasons why, she assured Ms. Sawyer that she was not being fired. However, DCMA was aware (documented) that Gerry Sawyer believed

she (Sawyer) would have been forced out of the organization by management absent the rumor.

Subsequently, Colonel Plourde learned about the rumors of firings and she began an investigation. Colonel Plourde assigned DCMA manager from another DCMA office Stacey Scantlebury to investigate rumors about possible firings in the agency. Plourde initially alleged that the rumors floating about were having a "deleterious effect on employee morale." Although Colonel Plourde later changed her story.

Ms. Scantlebury attempted to interview petitioner but petitioner questioned the authority of her investigation and refused to comply with her questions for fear that he was being targeted for whistleblowing. Petitioner was especially concerned because of the prior disclosures he had made to the IG that were the same issues Scantlebury was investigating. Scantlebury admitted to petitioner that she (Scantlebury) was not an investigator by profession, further calling the alleged investigation into question. Also, by this time VanDerbeck had actually been fired which meant the rumors were becoming fact.

Colonel Plourde later issued petitioner a "direct order" commanding him to cooperate with Scantlebury's investigation. Believing that Scantlebury's investigation was illegal and retaliatory, petitioner did not comply and issued detailed disclosures to the DOD IG questioning the authority of Colonel Plourde/DCMA to run the investigation and the motivations of

Colonel Plourde in initiating the investigation which was to find the information leak.

It was also noted that Colonel Plourde was investigating a rumor which by Colonel Plourde's definition was not true. Untrue or false rumors cannot be investigated because they have no basis if they are really untrue or false. Knowing that VanDerbeck was actually fired reinforced the fact that the rumor had a basis and petitioner made accurate disclosures leaving the fact that the alleged investigation was for retaliation against petitioner.

Petitioner was given a 30-day suspension for refusal to engage in unethical acts while non-whistleblowers who refused to answer questions in the alleged investigation suffered no penalty.

3. Petitioner appealed the suspension to the Merit Systems Protection Board ("MSPB") claiming that the suspension was retaliation for his whistle-blowing. In particular, petitioner contended that the suspension was retaliation for his protected disclosure that Colonel Plourde had committed an illegal act.

On October 24, 2007, the MSPB agreed with petitioner and reversed the 30-day suspension. The Board concluded that petitioner's disclosure – that Colonel Plourde threatened to fire VanDerbeck because she had made protected disclosures regarding the safety of the C-130J program was illegal and itself a violation of the WPA – was protected. The Board also held that Colonel Plourde used her authority to

suspend petitioner and that the suspension was due to the protected disclosure. App.53.

Subsequently, the Office of Personnel Management ("OPM") filed a brief in support of Petition for Reconsideration. On February 12, 2009, MSPB reversed their previous October 2007 decision. In doing so, the Board held that petitioner's disclosure was not protected, because petitioner could not have had the requisite belief that Colonel Plourde had violated the WPA. App.26-30.

The Federal Circuit affirmed the Board's second decision. Addressing petitioner's disclosure, the court held that petitioner did not possess a reasonable belief that a law, rule or regulation had been violated by Colonel Plourde, because the information he received was nothing more than "highly attenuated gossip." App.6. The court also held that based upon the evidence, the agency would have suspended petitioner regardless of his protected disclosure, given that petitioner refused to comply with Colonel Plourde's investigation. App.8.

Petitioner filed a motion for extension of time to file a petition for writ of certiorari. That motion was granted, extending the time to file until December 31, 2009.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for two reasons. First, the court of appeals' standard for whistleblower retaliation is contrary to the statutory language of the Whistleblower Protection Act ("WPA") and provides no protection for those who speak aloud in reasonably believing that members of government agencies are breaking the law. Second, this issue is vitally important to the efficient and effective running of government.

I. Congress has been quite clear that whistleblowers making disclosures are protected when they "reasonably believe" a law is being broken.

The Whistleblower Protection Act provides a four-part test for establishing whistleblower retaliation. Under 5 U.S.C. § 2302(b), the WPA requires that: (1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used their authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the acting official took, or failed to take, the personnel action against the aggrieved employee because of the protected disclosure. *See also, Lachance v. White*, 174 F.3d 1378, 1380 (Fed. Cir. 1999); *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 687-88 (Fed. Cir. 1992); *Dorrall v. Dep't of the Army*, 301 F.3d 1375, 1380 (Fed. Cir.

2002), *overruled on other grounds by Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322 (Fed. Cir. 2006).

Under this standard, courts use an objective test to determine whether or not a disclosure is protected. *See e.g., Lachance*, 174 F.3d at 1381 (objective test is applied and a "purely subjective perspective of an employee is not sufficient even if shared by other employees"). The objective test asks whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the WPA. *Id.* If the court below had applied this test, there would be no quarrel.

But the lower court applied a test diametrically opposed to one above and to that clearly written into statute by Congress. The lower court required not a reasonable belief, but a definitive one, requiring petitioner to establish with certainty that Colonel Plourde's alleged pending termination of Ms. VanDerbeck was not based on VanDerbeck's whistle-blowing. Such a test is contrary to the plain meaning of the statute and Congressional intent. *See c.f., Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("We begin, as always, with the language of the statute . . . ").

Not only is the court of appeals' standard contrary to the statutory language, it would provide little protection for whistleblowers. Rarely will whistleblowers have the certainty required by the court of appeals' standard. In most cases, whistle-blowers will not know without doubt that their

employers are violating the law. Whistleblowers are not attorneys and are not versed in the intricacies of the federal code. Thus, it is hard to imagine a situation where the court of appeals' standard would protect a whistleblower unless the whistleblower was as versed as that of a federal prosecutor.

This case stands as a prime example of limited protection for whistleblowers. Here, petitioner had substantial information from fellow employees that Colonel Plourde was targeting for termination Ms. VanDerbeck because of VanDerbeck's disclosures of safety issues regarding the C-130J. Petitioner had previously assisted VanDerbeck in filing a complaint with the Department of Defense Inspector General alleging these safety issues. Moreover, petitioner believed that VanDerbeck was a superb engineer and knew and reported that VanDerbeck had a Master of Science in Telecommunications and had begun work on a Ph.D. in Electrical Engineering. Petitioner was also aware and reported that Susan VanDerbeck was reviewing C-130J safety issues as early as 2004. When petitioner heard from fellow employees that VanDerbeck was to be terminated by Plourde due to her disclosures, this information would have led any reasonable individual in petitioner's place to believe that a violation of the WPA was to be committed. But for the court of appeals this was not enough. Petitioner needed certainty that the reason VanDerbeck was to be terminated was due to violation of the WPA.

If certainty is required, it is hard to understand how the majority of whistleblowers will be protected for their disclosures unless they have concrete proof of a legal violation. This level of proof the WPA does not require.

The court of appeals' standard is both contrary to the WPA and the Congressional intent. It is also contrary to the purpose of the WPA – to protect whistleblowers from retaliation. As such, review is warranted.

II. The question presented is undoubtedly important to the country's efficiency.

As this Court has noted, "[e]xposing governmental inefficiency and misconduct is a matter of considerable significiance." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Indeed, Congress in passing the WPA had an overwhelming legislative mandate. As a leading commentator noted about the original 1978 passage of free speech rights, "The ideological breadth of the coalition supporting whistle-blower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." Robert G. Vaughn, Statutory Protection of Whistleblowers in the Executive Branch, 1982 U. Ill. L. Rev. 615, 619-620.

If anything, this mandate was intensified by passage of the Whistleblower Protection Act in 1989. While Congress seldom passes any significant

legislation unanimously, due to a pocket veto this law was approved twice in just over five months, along with an earlier unanimous approval in the Senate. 134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988); *id.* at H9323; *id.* at S.15337; 135 Cong. Rec. S10632 (daily ed., March 16, 1989); and *id.* at S2805. After Congress unanimously strengthened the Act in 1994, commentators hailed it as the strongest free speech law in history, on paper. *See, e.g.*, Thomas M. Devine, The Whistleblower Protection Act and the Modern Law of Dissent, 51 Admin. L. Rev. 531 (Spring 1999).

Unfortunately, the record of the Act has been one of sustained frustration for those who rely on it. S. Rep. 107-349, 107th Cong., 2d Sess. November 19, 2002. The bottom line is that the aggrieved employee almost always loses. In appellate decisions at the Federal Circuit Court of Appeals from October 1994 until September 1, 2003, whistleblowers had a 1-84 track record for decisions on the merits. Testimony of Thomas M. Devine, Hearings on S. 1358 before the Senate Governmental Affairs Committee (Nov. 12, 2003), slip testimony at 25. Although in theory the statute protects "any" lawful disclosure the employee reasonably believes is evidence of listed misconduct, in reality it no longer covers disclosures to co-workers, suspected wrongdoers, supervisors who lack authority to impose corrective action, *Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), or any speech except by the first person to disclose the information. *Meuwissen v. Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000).

There can be little serious disagreement that if the courts of appeals and boards require whistleblower certainty in order for a disclosure to be protected, there will eventually be fewer disclosures altogether.

Moreover, these disclosures are exactly the types that need most protection, because they are the most vulnerable to suppression. Agencies, under the guise of employee morale, have been known to tone down messages of potential hazards, or to censor them entirely. Career public servants have seen their reports amended or suppressed because they did not conform to the general office policy objectives or because they said too much. For example, Dr. David Graham, the scientist with the FDA who was directed to soften his conclusions regarding dangerous side effects of Vioxx, is only one of many examples.[1] Those who protest and persist in pressing their conclusions – particularly those who feel compelled to take the

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[1] Graham, associate science director at the Office of Drug Safety at the FDA, prepared a study in which he concluded that the pain drug Vioxx had dangerous side effects. He claims that he was pressured by superiors to soften his conclusions, and that he complied only as much as he could to avoid compromising his "deeply held convictions." He was consequently threatened and ostracized by the FDA. The drug manufacturer withdrew Vioxx from the market when an independent study confirmed his conclusions. FDA Failed Public on Vioxx, Scientist Says, at http://www.msnbc.msn.com/id/6520630 (last updated Nov. 19, 2004); Marc Kauffman, FDA Official Alleges Pressure to Suppress Vioxx Findings, Washington Post, Oct. 8, 2004, at A23.

dispute to Congress or the media – are prime targets for retaliation.

Another example is that of John Fitzgerald, an environmental analyst with the U.S. Agency for International Development in 2002, who was responsible for monitoring compliance on certain overseas development projects. He attempted to report to Congress legal violations and environmental mismanagement regarding questionable energy projects in Africa, South America, and Eastern Europe, but Treasury officials removed the information from his report before it reached Congress. His position was subsequently eliminated. Whistleblower's Information Deleted by Treasury Department Before Report Went to Congress, at http://www.bushgreenwatch. org/mt_archives/000194.php (September 28, 2004). In September 2004, the Merit Systems Protection Board granted him a hearing on the merits of his allegations, finding that he had made "a non-frivolous allegation of a protected disclosure." *Fitzgerald v. Dept. of Agric.*, 97 MSPR 181 (2004). His case was subsequently settled.

Denial of protected disclosures creates an obvious disincentive to report misconduct or to voice opinions that may be unpopular with superiors or managers. Perversely, the greater the magnitude of the problem and the cost, monetarily or politically, of correcting it, the greater is the risk to the small voice who is urging caution. If these employees choose the safer course and remain silent, the cost to the public could be enormous. Protection of employees' freedom to speak

out on such issues of public concern is essential to the proper and efficient functioning of agencies and the assurance of a safer and better-run nation.

It should also be noted that whistleblower protections are already severely limited. Courts have denied whistleblower protection to employees who are performing their normally assigned duties in reporting waste, fraud and abuse. *See Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351-54 (Fed. Cir. 2001); *Willis v. Dept. of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). The Federal Circuit has also held that mere differences of opinion on debatable policy decisions by agencies do not constitute protected disclosures under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). *See White v. Dept. of Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004). It is time for this Court to draw a line in the sand and prevent federal agencies and lower courts from denying whistleblowers the protections granted by Congress.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH M. PEDELEOSE, Pro Se
5252 Barrett Pkwy., SW #13
Marietta, GA 30064
(770) 425-4718

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3135

KENNETH M. PEDELEOSE,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

Kenneth M. Pedeleose, of Marietta, GA, pro se.

Michael N. O'Connell, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Todd M. Hughes, Deputy Director.

Appealed from: Merit Systems Protection Board

Petition for review of the Merit Systems Protection Board in AT0752060350-R-1.

DECIDED: August 6, 2009

Before RADER, PLAGER, and SCHALL, *Circuit Judges*.

PER CURIAM.

DECISION

Kenneth M. Pedeleose petitions for review of the final decision of the Merit Systems Protection Board ("Board") that (1) affirmed his thirty-day suspension for refusal to cooperate in an agency investigation, insubordination, and failure to follow instructions; and (2) rejected his allegation that his suspension was in retaliation for whistleblowing and, thus, in violation of the Whistleblower Protection Act ("WPA"). *Pedeleose v. Dep't of Defense*, 110 M.S.P.R. 508 (2009) ("*Final Decision*"). We *affirm*.

DISCUSSION

I

Mr. Pedeleose is an industrial engineer at the Defense Contract Management Agency ("DCMA"), Lockheed Martin Marietta ("LMM") facility. The circumstances giving rise to his thirty-day suspension began around June of 2005, when Mr. Pedeleose informed another DCMA employee, Gerry Sawyer, that management was planning on firing her. Immediately thereafter, Ms. Sawyer, "sickened" to hear that she was being fired after twenty-six years of Federal service, informed her supervisor that she had decided to retire in order to avoid being fired, and she submitted her retirement application. The DCMA LMM commander, Colonel Nicole Plourde, learned about Ms. Sawyer's application for retirement, as well as the circumstances that had prompted the

application. Colonel Plourde assured Ms. Sawyer that she had not been targeted for removal.

Colonel Plourde also learned about rumors concerning the termination of other DCMA employees. She became concerned that these rumors could affect the morale of the employees at the facility and that one of her supervisors was spreading the rumors by disclosing confidential information. Because of these concerns, Colonel Plourde decided to start an investigation and appointed Stacey Scantlebury to conduct the investigation.

After being appointed, Ms. Scantlebury met with Mr. Pedeleose and attempted to interview him. Before Ms. Scantlebury was able to ask a question, however, Mr. Pedeleose questioned the authenticity of her credentials and refused to comply with the investigation. Responding, Colonel Plourde showed Mr. Pedeleose the letter appointing Ms. Scantlebury and also gave him a letter directing him to cooperate with the investigation. In spite of Colonel Plourde's direct orders, Mr. Peueleose continued to be uncooperative and refused to answer Ms. Scantlebury's questions.

As a result of his behavior, DCMA suspended Mr. Pedeleose for thirty-days for refusal to cooperate with an investigation, insubordination, and failure to follow instructions. Mr. Pedeleose appealed his suspension to the Board. While Mr. Pedeleose did contest the propriety of his suspension, he did not dispute the events that occurred when Ms. Scantlebury attempted to interview him. Rather, Mr.

Pedeleose argued that he was justified in refusing to cooperate. In addition, he contended that DCMA did not suspend him for failure to cooperate, but instead did so in retaliation for his prior whistleblowing and, thus, violated the WPA.

In due course, the Board found that the agency had proven its charges against Mr. Pedeleose and sustained his thirty-day suspension. *See Final Decision,* 110 M.S.P.R. at 518. In so ruling, the Board explained that Mr. Pedeleose's justifications for disobeying Colonel Plourde's orders did not satisfy the narrow exceptions to the rule that government employees generally cannot disregard an order from a superior. *Id.* at 517-18. Furthermore, the Board ruled that DCMA had not violated the WPA when it suspended Mr. Pedeleose. *Id.* at 518-20. Mr. Pedeleose now appeals the *Final Decision.* We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

II

Our scope of review in an appeal from a decision of the Board is limited. Specifically, we must affirm the Board's decision unless we find it to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); *Kewley v. Dep't of Health & Human Servs.,* 153 F.3d 1357, 1361 (Fed. Cir. 1998).

On appeal, Mr. Pedeleose argues that the Board erred in sustaining his thirty-day suspension and in finding that DCMA did not suspend him in violation of the WPA. He does not, however, contest that he disobeyed several clear orders of Colonel Plourde directing him to cooperate with her investigation. Nor does he argue that the thirty-day suspension was an unreasonable penalty. Rather, as best we can tell, Mr. Pedeleose contends that he was justified in refusing to comply with the investigation because the investigation was somehow illegal. Next, Mr. Pedeleose suggests that, because DCMA's suspension was actually in retaliation for prior whistleblowing, the Board erred regarding his WPA defense. Specifically, Mr. Pedeleose states that the protected disclosures that caused his thirty-day retaliatory suspension were his disclosures to the Inspector General of the Department of Defense ("IG") that: (1) another DCMA employee, Susan VanDerbeck, was targeted for termination because she engaged in whistleblowing and (2) there were numerous problems in a project run by DCMA.

We address Mr. Pedeleose's arguments in turn.

III

A

Because the Board's decision regarding the charges against Mr. Pedeleose is supported by substantial evidence and otherwise in accordance with law, we affirm its decision sustaining the agency's

charges against him. Importantly, as mentioned above, Mr. Pedeleose does not dispute the facts surrounding Ms. Scantlebury's attempts to interview him for purposes of Colonel Plourde's investigation. Indeed, it is quite clear that Mr. Pedeleose flatly refused to answer any of Ms. Scantlebury's questions, doubted her authority as an investigator, and was wholly uncooperative. This was in the face of Colonel Plourde's repeated instructions to cooperate and her showing him the letter granting investigative authority to Ms. Scantlebury. Thus, it is clear that there is substantial evidence supporting the agency's charges of refusal to cooperate with an investigation, insubordination, and failure to follow instructions.

Although Mr. Pedeleose argues that he was justified in refusing to cooperate with the investigation, the Board properly found those arguments unavailing. Absent exceptional circumstances, government employees generally cannot refuse to do work simply because they disagree with a superior and, consequently, failing to comply with their duties is done at the risk of insubordination. *See Nagel v. Dep't of Health & Human & Servs.*, 707 F.2d 1384, 1387 (Fed. Cir. 1983). The evidence of record substantiates that the investigation was never found to violate any law or regulation. *See Bigelow v. Dep't of Health & Human Servs.*, 750 F.2d 962, 966 (Fed. Cir. 1984) (sustaining a disciplinary action for refusing to obey a supervisor because the instruction "was not unlawful on its face [and] not a clear and direct violation of a provision"). In fact, it would be

extremely difficult – if not impossible – for Mr. Pedeleose to accurately determine the legality of the investigation, as he did not even give Ms. Scantlebury the opportunity to ask him a single substantive question. As such, Mr. Pedeleose had nothing more than an unsupported subjective belief that the investigation was illegal, which is wholly insufficient for an exception to the general rule above. *See id.* at 965 ("[T]he orders the petitioners refused to obey were lawful, and the petitioners could not disobey the orders because of their own view of the legality or propriety of the direction."). Moreover, after asking the IG whether the investigation was illegal or in conflict with other ongoing investigations, the IG clearly and explicitly told Mr. Pedeleose to both comply with Colonel Plourde's requests and answer Ms. Scantlebury's questions.

In sum, the Board's decision regarding the charges against Mr. Pedeleose is supported by substantial evidence and otherwise in accordance with law. We therefore affirm its decision sustaining the charges against Mr. Pedeleose.

B

We now turn to Mr. Pedeleose's contention that the Board erred when it ruled that he had not established reprisal for whistleblowing. Pursuant to 5 U.S.C. § 2302(b), the WPA requires proof of four elements: (1) the acting official has the authority to take, recommend, or approve any personnel action;

(2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the acting official took, or failed to take, the personnel action against the aggrieved employee because of the protected disclosure. *See Lachance v. White,* 174 F.3d 1378, 1380 (Fed. Cir. 1999). The employee must establish "by a preponderance of the evidence that [he or she] made a protected disclosure, that subsequent to the disclosure [he or she] was subject to disciplinary action, and that the disclosure was a contributing factor to the personnel action taken against [them]." *Carr v. Soc. Sec. Admin.,* 185 F.3d 1318, 1322 (Fed. Cir. 1999). If the employee makes the requisite showing, there is still no violation of the WPA if the agency can "prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure." *Id.*

Addressing first Mr. Pedeleose's disclosure to the IG relating to Ms. VanDerbeck, we hold that substantial evidence supports the Board's decision that this was not a protected disclosure. In order to establish a protected disclosure, the whistleblower must have a reasonable belief that a law, rule, or regulation has been violated. *See, e.g., Lachance,* 174 F.3d at 1381 (requiring consideration of whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee" would reasonably conclude that a violation occurred); *Horton v. Dep't of the Navy,* 66

F.3d 279, 283 (Fed. Cir. 1995) (requiring "that the whistleblower had a reasonable belief that, for example, a rule or regulation had been violated"). Mr. Pedeleose's belief that a violation occurred – namely, that Ms. VanDerbeck was targeted for termination because of her whistleblowing about safety issues – was not reasonable, however. Rather, it was his purely subjective perspective, which he was even told was misguided. *See Lachance,* 174 F.3d at 1381 ("A purely subjective perspective of an employee is not sufficient even if shared by other employees.").

For example, Mr. Pedeleose learned of Ms. VanDerbeck's potential termination from a former DCMA employee, DeAngeles Davis. Ms. Davis did not learn of this information directly, but instead learned of it from another employee, Ms. Shelton-Thomas. Ms. Shelton-Thomas, in turn, merely heard about a meeting attended by Colonel Plourde and other employees where Ms. VanDerbeck's termination was allegedly discussed. Thus, the record evidence demonstrates that this information was nothing more than highly attenuated gossip. More significantly, Ms. Davis not only told Mr. Pedeleose about this entire "chain" of gossip, but also that any discussion of terminating Ms. VanDerbeck was due to her inappropriate conduct affecting DCMA's relationship with LMM employees, not due to her whistleblowing. In sum, there is substantial evidence that Mr. Pedeleose knew this information was highly suspect and that he was explicitly told that Ms. VanDerbeck's potential termination was not because of whistleblowing. Mr.

Pedeleose's belief to the contrary was therefore not reasonable and, thus, the Board was correct to find that he did not make a protected disclosure concerning Ms. VanDerbeck's potential termination.

Regarding the report that Mr. Pedeleose provided to the IG concerning alleged problems in a program run by DCMA, assuming without deciding that this was a protected disclosure, we affirm the Board's decision that there was clear and convincing evidence that the agency would have suspended Mr. Pedeleose regardless. The Board correctly considered the substantial record evidence and applied the relevant factors, such as: the strength of the evidence supporting suspension; the existence and strength of any motive by DCMA officials to retaliate; and DCMA's actions against non-whistleblowers who were otherwise similarly situated. *See Carr,* 185 F.3d at 1323. Importantly, the evidence submitted in support of the charge of insubordination and refusal to cooperate with a duly authorized agency investigation was substantial and largely undisputed. In addition, while Mr. Pedeleose argues that similarly situated non-whistleblowers were not suspended, he overlooks a critical distinction – those employees did in fact cooperate with the investigation and, therefore, were in no way "similarly situated." Thus, we cannot say the Board's decision is unsupported by substantial evidence or otherwise not in accordance with law.

We have considered Mr. Pedeleose's other arguments, but found them unpersuasive.

For the foregoing reasons, the final decision of the Board is affirmed.

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 16

Docket No. AT-0752-06-0350-R-1

Kenneth M. Pedeleose,

Appellant,

v.

Department of Defense,

Agency,

and

Office of Personnel Management,

Petitioner.

February 12, 2009

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Gary E. Jencson, Esquire, Bratenahl, Ohio, for the agency.

Becky C. Ronayne, Esquire, Washington, D.C., for the Office of Personnel Management.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) seeks reconsideration of the Board's decision in *Pedeleose v. Department of Defense*, 107 M.S.P.R. 191 (2007). For the reasons set forth below, the Board grants OPM's petition for reconsideration, vacates the decision and upholds the agency's action suspending the appellant.[1]

BACKGROUND[2]

¶2 The appellant was employed as an Industrial Engineer by the Defense Contract Management Agency (DCMA or agency), Lockheed Martin Marietta (LMM), when the agency suspended him for 30 days effective January 25, 2006, based on three related charges: 1) refusal to cooperate in an agency investigation; 2) insubordination; and 3) failure to follow instructions. 107 M.S.P.R. 191, ¶ 2. The investigation was initiated by the DCMA, LMM Commander, Colonel Nicole Plourde, in response to a rumor that certain employees of the DCMA were being targeted

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[1] Douglas K. Kinan has submitted what appears to be a motion to intervene or file an amicus brief. The Board denies the motion because Kinan fails to show that he will be affected directly by the outcome of the proceeding. *See* 5 C.F.R. § 1201.34(c).

[2] The factual background of this case is set forth in greater detail in the Board's previous decision. *See* 107 M.S.P.R. 191, ¶¶ 6-25.

for termination from federal service. *Id.* at ¶¶ 2, 7, 16. One of the allegedly targeted employees, Gerry Sawyer, was so upset by the rumor that on June 20, 2005, she submitted a retirement application, telling her supervisor that she had decided to retire rather than be removed. Learning of this, Col. Plourde met with Sawyer and told her that the rumor was false. *Id.* at ¶ 8. After the meeting, Col. Plourde decided to begin an investigation into the source of the rumor because, she said, she believed it was having a negative effect on employee morale. She also expressed concern that one of her supervisors was feeding the rumor by discussing confidential information with subordinates. *Id.* at ¶ 10.

¶3 On June 21, 2005, Col. Plourde appointed Stacy Scantlebury to conduct the investigation. She also ordered Sawyer to identify the person who informed her that she was going to be fired, and in response Sawyer named the appellant. When Scantlebury then attempted to interview the appellant about the rumor, he questioned her credentials as an investigator. Later, when Plourde showed him Scantlebury's appointment letter and directed him to cooperate with the investigation, the appellant refused, stating that her directive was an illegal order. *Id.* at ¶¶ 11-13. In refusing to answer the investigator's questions, the appellant also relied on his belief that the agency's investigation would interfere with an investigation into related matters that he believed would be conducted by the Department of Defense's Inspector General (IG). *Id.* at ¶ 14.

¶4 The appellant had submitted a report to the IG concerning safety problems in the C-130J aircraft and waste in the program developing it.[3] DCMA supervised LMM's performance on its contract for producing the aircraft. The May 16, 2005 report was developed by the appellant and other DCMA employees who had been disclosing problems of the C-130J to the Congress and other authorities for a number of years. The appellant's involvement in disclosing such problems was widely known at the DCMA. An IG report issued in July 23, 2004, had concluded that the aircraft did not meet contract specifications at that time. *Id.* at ¶ 6.

¶5 On June 6, 2005, the appellant notified the IG that another DCMA engineer, Susan VanDerbeck, had informed him of additional safety problems of the C-130J. Initial Appeal File (IAF), Tab 28, Exhibit E at 1-2. VanDerbeck then sent a list of alleged safety violations on the aircraft to the IG. *Id.* at 3-6. During this period, the appellant spoke with a former DCMA employee, DeAngeles Davis, who told him of a meeting at which Plourde suggested the termination of VanDerbeck. On June 15, the appellant sent the IG his account of what Davis reported: that another

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[3] The appellant sent the report to various individuals in the IG's office. As used in this opinion, "IG" generally refers to the IG's Daniel P. Meyer, Director – Civilian Reprisal Investigations, who most often represented the IG in communications with the appellant and with agency officials concerning the appellant.

employee, Shelton-Thomas, had told Davis about a meeting attended by Col. Plourde, Henrietta Snow, and Myra Tate, and said that, after a discussion of safety issues raised by VanDerbeck, Plourde had said that since VanDerbeck was a probationer, they could fire her. *Id.*, Exhibit F at 1-2, 6-8. On June 16, Davis emailed the appellant a written summary of their June 11 conversation that he had requested. It did not mention VanDerbeck's disclosure of safety issues, but rather stated that her informant, Shelton-Thomas, said VanDerbeck was targeted for firing because of inappropriate conduct affecting DCMA's relationship with LMM employees. The email also identified three other employees as targeted for firing according to Shelton-Thomas, but it made no mention of whistleblowing in connection with them. *Id.* at 26-27. When the appellant forwarded this email to the IG on June 20, 2005, he admitted that, two days before, Davis had told him that, contrary to his recollection, she had not stated that C-130J safety issues were discussed at the meeting where firing VanDerbeck was discussed. *Id.* at 29.

¶6 In refusing to cooperate with the agency's investigation, the appellant stated that he had already provided the information that he had to the IG. 107 M.S.P.R. 191, ¶ 18. However, in communications with Leigh Owens, the DCMA's attorney, the IG representative, Dan Meyer, stated that he had urged the appellant to cooperate with the agency's investigation and to refer to the IG any questions which he feared could compromise the IG's investigation. Meyer told

Owens that this would permit the two of them to resolve the matter, rather than have witnesses set IG policy. The IG also approved the questions that Scantlebury expected to ask the appellant, stating that he saw on their face no conflict between his investigation and hers. *Id.* at ¶ 19. Although the agency did not inform the appellant of this discussion between the agency and the IG, the appellant on his own consulted with the IG, who told him to cooperate with lawful agency investigations. However, the IG declined to address the appellant's questions about the legal authority of the agency to conduct its investigation. Based on his doubts about the lawfulness of the investigation and his belief that it could compromise the IG investigation into related matters, the appellant continued to refuse to answer any questions of the agency investigator concerning the rumored targeting of employees for firing. *Id.* at ¶¶ 21-24. Based on this conduct, the agency suspended him for 30 days based on refusal to cooperate with its investigation; insubordination; and failure to follow instructions. *Id.* at ¶ 26.

¶7 The appellant appealed his 30-day suspension to the Board, contending that the action was in retaliation for his whistleblowing. The appellant cited several alleged protected disclosures in his initial appeal, including his disclosures that Plourde's threatening to fire VanDerbeck and the rumor investigation that Plourde initiated were violations of law and abuses of authority. He also claimed that his suspension was retaliation for earlier equal

employment opportunity activity and was based on an improper agency belief that he had created a hostile work environment in his office. The appellant withdrew his initial request for a hearing, and the administrative judge decided the case on the written record. In his initial decision, the administrative judge found that the agency proved its charges, that the penalty of a 30-day suspension was reasonable, and that the appellant failed to establish his affirmative defenses. *Id.* at ¶¶ 3-4. The appellant filed a petition for review of the decision in which he reasserted the affirmative defenses he raised below. *Id.* at ¶ 5.

¶8 In its decision, a majority of the Board determined that the agency failed to prove the charges on which the suspension was based and that its action was in retaliation for whistleblowing. In addressing the agency's charges of refusal to cooperate with its investigation, the Board reaffirmed the general rule that, except in certain limited circumstances, an employee may not disregard an order merely because there is substantial reason to believe the order is not proper, but must comply with the order and then challenge it through a complaint or grievance. The Board noted the recognized exceptions to this rule, situations where complying would clearly place the employee in a dangerous situation or would cause him irreparable harm, but it determined that the Board must consider whether an exception is warranted in other circumstances where the employee doubts the legality of the instruction. *Id.* at ¶ 27. The

Board stated that this determination should take into account the considerations it found to underlie the rule: the need to avoid harm to the agency and its mission from the employee's failure to comply and the fact that the employee may be mistaken in his belief. *Id.* at ¶ 28.

¶9 The Board held that an exception to the rule requiring obedience to an agency order should be recognized in the circumstances of this case. The Board found that the agency's investigation involved only rumor spreading, not serious misconduct, and that therefore the agency failed to show any harm to the agency's mission from the appellant's lack of cooperation. The Board also cited evidence that the appellant may not have been mistaken in believing that the agency investigation might conflict with that of the IG. *Id.* at ¶ 29. The Board also found that the appellant made an effort to comply by seeking the advice of the IG and providing the IG the information sought and that the agency's "disingenuous" failure to inform him of its coordination with the IG and of the IG's approval of its questions was significantly responsible for the appellant's failure to cooperate. *Id.* at ¶¶ 30-31. The Board concluded that under these circumstances an exception to the rule requiring obedience to an agency order should be recognized and that the agency therefore failed to prove its charges of failure to cooperate and insubordination. *Id.* at ¶ 32.

¶10 The Board also found that the appellant established that his suspension was in retaliation for

his whistleblowing. Based on the evidence that the appellant submitted, the Board determined that the alleged protected disclosure at the heart of his retaliation claim was contained in his emails to the IG stating that Plourde threatened to fire VanDerbeck because of her disclosures regarding the safety of the C-130J program and that Plourde thereby abused her authority and violated the Whistleblower Protection Act (WPA). *Id.* at ¶ 33. The Board found that the appellant reasonably believed that VanDerbeck made protected disclosures of which Plourde was aware, that Plourde was correctly quoted regarding firing VanDerbeck, and that her statement exhibited a violation of the WPA and an abuse of authority. *Id.* at ¶ 39. Because the agency's rumor investigation began soon after the appellant sent his June 2005 email to the IG, because the email was copied to Plourde, who proposed his suspension, and because the deciding official also knew of his allegation concerning Plourde, the Board found that the appellant satisfied the knowledge/timing test for establishing that his disclosure was a contributing factor in the agency's action. *Id.* at ¶ 40.

¶11 Finally, the Board determined that the agency failed to rebut the appellant's prima facie case of reprisal for whistleblowing because it did not show by clear and convincing evidence that it would have suspended him in the absence of his protected disclosure. In reaching this conclusion, the Board relied on the agency's failure to prove its charges against the appellant and on the strength of the evidence that

Plourde had a motive to retaliate because she was the alleged wrongdoer, the reasons she gave for the agency's investigation were inconsistent, and she was aware of the appellant's objections to the investigation, yet failed to inform him of the IG's approval of the agency's proposed questions. *Id.* at ¶¶ 43-46. The Board also cited the absence of evidence of similar agency actions against non-whistleblowers who were otherwise similarly situated. *Id.* at ¶ 47.

¶12 Chairman McPhie dissented from the Board's decision. The Chairman would not have made an exception to the obey-now-grieve-later principle in this case, noting that an exception has been recognized only in unusual circumstances, such as where obedience would put the employee in danger of serious harm or where the order was a clearly unlawful one. He would have found that the appellant was mistaken in thinking the agency had no right to investigate who was spreading upsetting rumors that certain employees were being targeted to be fired and that the appellant could not reasonably have concluded that the investigation into rumor spreading would interfere with an IG investigation into his allegation that an employee was going to be fired for illegitimate reasons. In addition, the Chairman noted that by the time of the agency's second effort to question the appellant, he was aware that the IG knew of his concerns but had not shut down the agency's investigation. The Chairman would have found that the appellant was not an agent of the IG and was not free to decide for himself

that he must protect the IG's prerogatives by continuing to refuse to answer questions. 107 M.S.P.R. 191, dissenting opinion ¶¶ 1-5.

¶13 The Chairman also would not have found reprisal for whistleblowing. He concluded that the appellant's report to the IG that Plourde threatened to fire VanDerbeck because she had disclosed safety violations to the IG was not a protected disclosure. He found that the appellant's assertion was based on fourth-hand information about what was said at a meeting he did not attend and that the appellant's informants in subsequent communications with him cast doubt on the information they provided. *Id.* at ¶¶ 6-9. Finally, the Chairman would have found that, even if the appellant's disclosure was protected and contributed to the agency's action, the agency easily established its affirmative defense, considering the strength of its case and the state of the law when it acted. *Id.* at ¶¶ 10-11.

¶14 OPM filed a petition for reconsideration of the Board's decision in which it contends that the Board erred in establishing an exception to the obey-now-grieve-later principle that vastly expanded the recognized exceptions, which apply only in extreme situations where compliance would involve the employee in clear physical danger, the surrender of constitutional rights, or irreparable harm. OPM argues that the case law does not support the Board's finding that the employee's disobedience to the agency's order must be shown to have caused tangible harm to its mission or that legitimate concerns about

the lawfulness of the agency's order can excuse the employee's non-cooperation where the agency failed to address them to the employee's satisfaction. OPM also disputes the Board's finding of reprisal for whistleblowing. It contends that the Board erred in finding a protected disclosure in the appellant's allegations concerning statements at a meeting where the allegations were based on an unsubstantiated fourth-hand report that a disinterested observer could not reasonably believe on such a basis. The Board also erred, OPM asserts, in concluding that the agency did not show that it would have taken the same action absent the appellant's disclosure. OPM argues that this conclusion is based on the finding that the agency did not prove its case because of a newly recognized exception and that this exception cannot properly be applied retroactively to the issue of whether the agency proved its affirmative defense based on what it would have done at the time.

¶15 In response to OPM's reconsideration request, the appellant argues that the Board has discretion to establish a new exception to the general rule that requires employees to obey agency orders and bring objections later. Disagreeing with OPM's contention concerning the exception recognized by the Board, the appellant characterizes it as a narrow one, highly dependent on the specific facts of this case. The appellant contends that the Board properly found that the agency cannot complain of his insubordination where he made efforts to learn from the IG whether he should comply to no avail and that it was

the disingenuous conduct of the agency that deprived him of the information that would have allowed him to obey. The appellant argues that the agency's investigation was initiated by Plourde in bad faith because it was unnecessary to dispel the rumor about employees targeted for firing, that its direction was inconsistent with the stated goal of identifying a management leak, and that its real goal was to entrap him into non-cooperation so that he could then be punished for his disclosures. The appellant also argues that OPM's opposition to the Board's finding of whistleblowing reprisal merely disputes the Board's fact findings and does not constitute an appropriate basis for seeking reconsideration. In any event, he contends that the report he received from Davis concerning Plourde's threat to fire VanDerbeck was definite and specific and that the timing of her report and her knowledge of VanDerbeck's disclosures made it reasonable for him to believe that it was true. He also disputes OPM's challenge to the Board's affirmative defense finding, arguing that the record shows that the decision to discipline him was intertwined with his disclosures and that, in the absence of comparable agency actions against similarly situated nonwhistleblowers, OPM's argument has no factual basis.

ANALYSIS

The appellant was required to cooperate with the agency's investigation, and the agency proved its charges that he failed to do so.

¶16 The rule involved in this case has long been recognized as one that is necessary to an agency's ability to effectively manage the workplace. The rule generally requires an employee to comply with an agency order, even where the employee may have substantial reason to question it, while taking steps to challenge its validity through whatever channels are appropriate. *See Bigelow v. Department of Health & Human Services*, 750 F.2d 962, 965 (Fed. Cir. 1984); *Gragg v. United States Air Force*, 13 M.S.P.R. 296, 299 (1982). The rule reflects the fundamental management right to expect that its decisions will be obeyed and its instructions carried out. *See Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) (permitting employees to refuse to do work because of disagreements with management violates the first law of the work place, namely that it is a place for doing work).

¶17 There is no dispute that the recognized exceptions to the requirement that agency orders be obeyed apply in extreme or unusual circumstances. *See, e.g., Gragg v. U.S. Air Force*, 13 M.S.P.R. at 299 (order placing employee in dangerous situation); *Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470, 474 (1994) (order to make disclosure that could cause

irreparable harm)[4]. In its petition, OPM challenges the Board's determination that an additional exception to the rule should be recognized in the circumstances of this case. OPM contends that there is no support in the case law for the exception created by the Board, and it argues that it will vastly expand the circumstances when the rule will not apply. The appellant counters that the exception here is narrowly tailored to very specific and limited circumstances. The Board made its decision to create the exception after taking into account the two considerations that it found to underlie the rule, harm to the agency and the possibility that the employee is wrong. The Board determined there was no harm to the agency from the appellant's non-cooperation because the investigation that the appellant resisted was not directed at serious misconduct, and it found that the appellant had a legitimate concern that answering the agency's questions might interfere with an IG investigation.

¶18 As OPM points out, the Board cited no precedent in the case law for this approach to the applicability of the obey-now-grieve-later rule, which has been applied to a broad range of agency orders. While the decision cited cases in which the rule was invoked to discipline employees for refusing to

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[4] In *Fleckenstein*, the Board modified *Gragg* to the extent the decision in *Gragg* could be read to exclude the irreparable harm exception. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-408 (1995).

cooperate with investigations into criminal or other serious misconduct, these cases do not state the limitation inferred by the Board.[5] The rationale for the rule, as noted above, is that an employee's failure to obey supervisory instructions is inherently harmful to the orderly accomplishment of work. There is no requirement in the cases that the agency must demonstrate harm from non-cooperation in a particular case. Similarly, while there is an exception for clearly unlawful orders, *see Harris v. Department of the Air Force*, 62 M.S.P.R. 524, 529 (1994), the appellant has cited no law or regulation that the agency's investigation on its face violated. Other exceptions to the rule are not based on the correctness of the employee's objections to the order, but apply in situations where there could be a significant adverse impact on the employee from cooperation with an order that may be improper. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. at 408 (the appellant was not entitled to disobey a reassignment order, despite the Board's ultimate agreement that it was not effected properly, because his conduct was not protected by a privilege or by a concern that it would cause him

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[5] The decision also cited *Brown v. Department of Justice*, 31 M.S.P.R. 211 (1986), as support for recognizing a new exception to the rule based on the surrounding circumstances. However, this case did not address the applicability of the rule, but the factors bearing on the appropriate penalty for a violation of it, finding there that the appellant's removal should be mitigated to a 30-day suspension.

irreparable harm). The appellant showed nothing comparable in his situation.

¶19 In determining that the appellant's non-cooperation was based on a legitimate concern, the Board relied on a finding that, after the appellant made an effort to comply by seeking advice from the IG's office, the agency's withholding of information from the appellant about its contacts with the IG was responsible in part for the appellant's non-cooperation. In these contacts, the IG approved the agency investigator's proposed questions as not interfering with the IG investigation and stated that he saw no conflict between the two investigations. We believe the decision erred in finding that the IG failed to give the appellant clear advice. The IG advised the appellant to cooperate and to refer any questions he felt would compromise the IG investigation to the IG. While the appellant was dissatisfied because the IG declined to address the lawfulness of the agency investigator's appointment, he knew that the IG did not tell him that a blanket refusal to answer any of the investigator's questions was necessary to protect the integrity of the IG's investigation. The appellant also must have been aware that the IG himself took no action to prevent the agency from questioning him. The appellant's situation is not distinguishable from that of others who are required to obey a lawful order and challenge it later, even an order they have substantial questions about. It was not the appellant's responsibility or right to take whatever actions he thought appropriate to protect the IG's

investigation when the IG himself took no action to prevent the supposed harm. Excusing the appellant from obeying the agency's order here broadens the exception in a way that threatens to make the exception the rule.

¶20 Thus, we find that the Board erred in recognizing an exception to the obey and grieve later principle in the circumstances of this case. In light of the advice that the appellant received from the IG, we cannot find that the agency's withholding of information about its contacts with the IG was responsible for his refusal to cooperate. The appellant questions the need for the agency's investigation, its authorization, and inconsistencies he perceives in the reasons given for it. However, the purpose of the agency investigation was a legitimate one on its face, and the appellant was required to cooperate with it while raising his objections through appropriate channels. The appellant argues that the agency's actions show that the investigation was a bad faith effort to manipulate his refusal so that he could be disciplined. The only specific impermissible motive advanced by the appellant for this alleged agency action is his claim of reprisal for whistleblowing, which is addressed below.[6]

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[6] The appellant did not pursue his initial claim of retaliation for EEO activity.

The appellant did not establish reprisal for whistleblowing.

¶21 The Board's decision held that the appellant established that his suspension was a reprisal for his disclosure that Plourde threatened to fire VanDerbeck because of her disclosure to the IG of safety violations on the C-130J and that Plourde thereby abused her authority and violated the WPA. The appellant's disclosure was made in communications sent to the IG on June 15, 2005, that repeated what the appellant said he was told by former employee Davis concerning a threat allegedly made at a meeting at which VanDerbeck's disclosure of safety violations was discussed. On further examination, we agree with OPM that the Board misapplied the test for determining whether the appellant's report was a protected disclosure. While a disinterested observer who was aware of the information asserted could reasonably conclude that Plourde's alleged threat was an abuse of authority, as the Board found, we cannot agree with the Board's finding that the appellant reasonably believed in the factual truth of his report of what happened at the meeting. 107 M.S.P.R. 191, ¶ 39.

¶22 There are several reasons to doubt the accuracy of the report. Davis, the appellant's informant, was not present at the meeting where the alleged threat was made, and neither was Shelton-Thomas, Davis's informant. Moreover, the appellant stated in his affidavit that Shelton-Thomas, when he spoke with her about the matter on June 15, 2005, refused to

discuss it with him, dismissing it as a rumor. IAF, Tab 28, Exhibit F at 7. Furthermore, the summary of their conversation that Davis sent the appellant at his request a few days later made no mention of VanDerbeck's disclosures as the reason for Plourde's suggestion that she be fired. *Id.* at 26-27. Finally, the appellant acknowledged in his June 20, 2005 email forwarding the summary to the IG that two days earlier Davis had informed him that, contrary to his recollection, she had not told him that VanDerbeck's safety violation allegations were discussed at the meeting. *Id.* at 29. Under these circumstances, the appellant lacked a reasonable basis for his assertion that Plourde violated the WPA and abused her authority by threatening to fire VanDerbeck on account of VanDerbeck's disclosure of safety violations. Thus, we find that the appellant's report of this alleged threat to the IG was not a protected disclosure for purposes of the WPA.

¶23 In its prior decision, the Board found that this disclosure was protected and that the appellant made a prima facie case that it contributed to the agency's decision to suspend him. The Board then considered the agency's argument that it would have suspended the appellant in the absence of the disclosure, and it concluded that the agency did not establish its defense because the evidence for its action was weak and Plourde had a strong motive to retaliate. Finding that the appellant therefore established his primary whistleblowing reprisal claim, the Board determined that it was unnecessary to address other protected

disclosures alleged by the appellant – that agency management violated the law and abused its authority by targeting employees other than VanDerbeck for firing and by conducting an investigation into rumors that certain employees were being targeted for termination. 107 M.S.P.R. 191, ¶ 40, n.8. These allegations are intertwined with the appellant's primary disclosure that we have found not to be protected. The appellant's sources for the targeting of other employees are the same as his sources for the targeting of VanDerbeck, and reliable evidence for his belief that termination of these employees was threatened because of their whistleblowing is equally lacking. We find that the appellant had no reasonable basis for making these allegations or for asserting that the agency's investigation of the targeting rumor was retaliatory in nature.

¶24 The only other alleged protected disclosure raised by the appellant was the May 16, 2005 report titled "Cover-up in the Department of Defense."[7] The report by the appellant and other employees covers the C-130J program over a number of years and criticizes agency management for wasteful expenditures, safety problems, and their alleged concealment. This report was not the focus of the appellant's appeal. Assuming, however, that the report makes

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[7] *See* 107 M.S.P.R. 191, ¶ 33, n.7. The other disclosures listed in footnote 7 address the alleged targeting of VanDerbeck and other employees for termination, the investigation of the targeting rumor, and related matters.

protected disclosures, we find that the agency established by clear and convincing evidence that it would have suspended the appellant in the absence of such disclosures. In making this determination, the Board has considered the strength of the agency's evidence in support of its action and the strength of any motive to retaliate by those involved in the decision. We have found that the agency proved the charges on which the appellant's suspension was based, and we find that the agency had strong evidence to support its action. Indeed, the content of the charged conduct was not disputed, but rather was held justified by our prior decision recognizing an exception to the general duty to obey agency orders. We have now determined that such an exception is unwarranted. The lengthy report, which largely concerns actions and events that preceded Plourde's employment by the agency, makes few references to her and articulates no specific criticism of her that could constitute a protected disclosure. It thus presents no basis for inferring a strong motive on her part to retaliate against the appellant. Thus, we conclude that, in light of the strong case in support of the agency's action and the absence of a strong motive to retaliate by the officials responsible for the action, the agency has shown by clear and convincing evidence that it would have taken the action in the absence of the other alleged protected disclosures raised by the appellant in the May 2005 report.

ORDER

¶25 Accordingly, the Board grants the Director of OPM's petition for reconsideration, vacates its previous decision, and upholds the agency's action suspending the appellant for 30 days. This is the final decision of the Merit Systems Protection Board in this appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 248

Docket No. AT-0752-06-0350-I-1

Kenneth M. Pedeleose,

Appellant,

v.

Department of Defense,

Agency.

October 24, 2007

Kenneth M. Pedeleose, Marietta, Georgia, pro se.

Gary E. Jencson, Esquire, Bratenahl, Ohio, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Chairman McPhie issues a
separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that affirmed his

30-day suspension. For the reasons set forth below, we GRANT the appellant's petition for review under 5 U.S.C. § 7701(e), REVERSE the initial decision, and do NOT SUSTAIN the agency's 30-day suspension.

BACKGROUND

¶2 On October 18, 2005, the agency proposed to suspend the appellant from his position as a GS-12 Industrial Engineer for the Defense Contract Management Agency (DCMA), Lockheed Martin Marietta (LMM), in Marietta, Georgia, for 30 days based on three charges: (1) refusal to cooperate in an agency investigation; (2) insubordination; and (3) failure to follow instructions. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4e. The first charge consisted of two specifications, namely, that the appellant refused to meet with agency investigator Stacy Scantlebury, Chief of Special Processes at DCMA, Atlanta, for an interview during two investigations of rumors that certain employees within the appellant's command were being targeted for termination from federal service. *Id.*, Subtab 4e at 3. The second charge specified that on June 22, 2005, the appellant expressly refused to cooperate with the investigation in response to the oral and written directions to cooperate by his supervisor, DCMA LMM Commander Colonel Nicole Plourde. *Id.* at 3-4. The third charge specified that the appellant failed to follow Plourde's direct written instructions to meet with Scantlebury on September 12, 2005, and to fully cooperate and answer all questions posed by her as part of her

investigation. *Id.* at 4. The deciding official sustained the charges and the agency effected the suspension on January 25, 2006. *Id.*

¶3 On appeal to the Board, the appellant raised the affirmative defense of reprisal for whistleblowing activity. He alleged that the agency's action was reprisal for his protected disclosures: (1) that, in February 2005, agency officials were not holding Lockheed Martin, which had the government contract on the C-130J, a medium-range, tactical aircraft, accountable for submitting bills to the government that are substantiated and traceable, IAF, Tab 28, Exhibit B; (2) that threatening to fire Susan VanDerbeck, who had also made protected disclosures regarding the C-130J, and other employees was a violation of law, the Whistleblower Protection Act (WPA) and an abuse of authority; and (3) that the investigation of rumors that certain employees within the appellant's command were being targeted for termination constituted a violation of law and an abuse of authority. He also alleged that the agency's action was retaliation for prior equal employment opportunity (EEO) activity and harmful error, and claimed that the agency improperly believed that he had created a hostile work environment in his office and that the 30-day suspension penalty constituted disparate treatment. IAF, Tab 1, Tab 16 at 7-8, Tab 21 at 5-27, Tab 26. The administrative judge apprised the appellant of the burden and elements of proof as to his affirmative defense of reprisal for whistleblowing. IAF, Tab 19 at 2-3.

¶4 The appellant initially requested a hearing but later withdrew this request. IAF, Tabs 1, 4, 19 at 1. Following his receipt of the parties' final submissions, the administrative judge issued an initial decision affirming the agency's action. IAF, Tab 29, ID. The administrative judge found that the agency proved its charges by preponderant evidence and showed that the penalty of a 30-day suspension was reasonable. *Id.* at 3-4, 7-9. The administrative judge further found that the appellant failed to establish his affirmative defenses. *Id.* at 4-7.

¶5 In his PFR, the appellant reasserts the affirmative defenses he raised below, alleges bias by the administrative judge, and claims that the administrative judge ignored evidence and accepted false statements by agency witnesses.[1] Petition for Review File (RF), Tab 1. The agency has responded in opposition. RF, Tab 3.

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[1] Before and after the close of the record on PFR, the appellant submits for the first time a number of additional documents. We have carefully considered these submissions under our standard for admitting evidence after the close of the record below. *See* 5 C.F.R. § 1201.115(d) (the Board will not consider evidence submitted for the first time with a PFR absent a showing that it is both new and material). We find that none of the appellant's submissions are admissible under that standard and we have not considered them.

ANALYSIS

Factual background.

¶6 The appellant submitted a May 16, 2005 report titled "Cover-up in the Department of Defense," IAF, Vol. 5, the appellant's Exhibit D at 4-55, to the DOD IG and Senator Grassley. *Id.* at 1-2. The report was developed by the appellant and other employees who had for a number of years been involved in disclosing to Congress and other authorities details of safety problems and waste in the troubled history of the C-130J program. The appellant's involvement in disclosing problems with the C-130J program was widely known at DCMA. The report identified safety and waste problems with the C-130J program that existed before and after the issuance of a July 23, 2004 report by the IG stating that the IG substantiated the allegation that, at that time, the C-130J aircraft did not meet contract specifications and therefore could not perform its operational mission. IAF, Tab 28, Exhibit A. A month after the appellant submitted this report, the appellant helped VanDerbeck, an engineer and a probationary employee, file a complaint with the DoD IG regarding safety issues that she had observed as she worked in the C-130J program. IAF, Tab 28, Exhibit E. In her June 10, 2005 complaint, VanDerbeck identified 14 alleged violations in the C-130J program. *Id.* The appellant's e-mail to the IG of VanDerbeck's complaint was copied to Plourde. *Id.* On June 15, 2005, the appellant received information that in a meeting, Plourde discussed the system safety issues that

VanDerbeck was raising and that Plourde was quoted as saying that "since Susan Vanderbeck is a probationary employee all they (DCMA management) have to do is fire her." IAF, Tab 28, Exhibit F. The appellant e-mailed this information to the IG. *Id.* The e-mail specifically identified those present at the meeting, Plourde, Henrietta Snow, and Myra Tate, and stated that the appellant suspected that Tate told "Shelton-Thomas, who in turn told Ms. Davis" what Plourde said. *Id.* The agency terminated VanDerbeck the following day.

¶7 On June 16, 2005, De Angeles Davis, a former DCMA LMM employee, sent the appellant an e-mail message stating that she had learned from LaNorma Shelton-Thomas[2] that VanDerbeck, Kim Lee, and Gerry Sawyer were targeted by Plourde for termination. IAF, Tab 28, Exhibit F at 1, 26-27.

¶8 On Saturday, June 18, 2005, the appellant telephoned Ms. Sawyer at home and told her that he had heard that she was "targeted to be fired." IAF, Tab 6, Subtab 4w at 10, the appellant's Exhibits I at 5, K at 3. At this point, it was known that VanDerbeck had been fired. Ms. Sawyer became very upset and decided to retire to avoid removal. *Id.*, Subtab 4w at 10. Accordingly, when she returned to work on Monday, June 20, 2005, Ms. Sawyer submitted paperwork for her retirement and began

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[2] Ms. Davis's e-mail mistakenly refers to Ms. Shelton-Thomas as Ms. Thomas-Shelton. IAF, Tab 28, Exhibit F at 26.

looking for Kelly Wells, her supervisor, to notify him that she intended to retire. *Id.* During this time, various DCMA LMM supervisors, including Mr. Wells and Kenneth Pates, heard the rumor that Ms. Sawyer and others were going to be removed. *Id.* at 11, 13, 17. Mr. Pates reported the rumor to Plourde and Ms. Snow, who met with Ms. Sawyer and told her that the rumor was false. *Id.* at 11, 17, IAF, Tab 22, agency Exhibit 7 at 2. Plourde observed that Ms. Sawyer was visibly upset during the meeting and that she advised Plourde that she was stunned over the weekend after being told that she was going to be fired. IAF, Tab 22, agency Exhibit 7 at 2. Plourde asked Ms. Sawyer to reveal the name of the person who had called her and told her she was going to be fired. Ms. Sawyer declined to do so. IAF, Tab 6, Subtab 4w at 11, Tab 22, agency Exhibit 7 at 3.

¶9 On the same day, the appellant sent an e-mail to the IG (DoD) informing the IG that he had confirmation of his earlier e-mail to the IG reporting that Plourde was targeting VanDerbeck for firing because of her whistleblowing and informing the IG that Plourde was targeting additional employees for firing. IAF, Tab 28, Subtab F at 29. The next day, June 21, 2005, Plourde began an investigation into the rumors about terminations.

¶10 Plourde stated that, after meeting with Ms. Sawyer, she decided to conduct an investigation into the source of the information that Ms. Sawyer was about to be fired because she believed that such information was having a negative effect on employee

morale at DCMA LMM. She averred that on the afternoon of June 20, 2005, she discussed the matter with agency counsel Leigh Owens, who agreed that an investigation was a good idea and suggested that Plourde consider using Scantlebury as the investigator because she had no connections with DCMA LMM and had conducted similar investigations in the past. Plourde further stated that she initiated the investigation because she "was concerned that one of [her] supervisors was inappropriately discussing confidential management information with subordinates and that this conduct was feeding rumors that certain employees were targeted to be fired." IAF, Tab 22, agency Exhibit 7 at 3-4.

¶11 On June 21, 2005, Plourde issued an appointment letter naming Scantlebury to conduct the investigation. IAF, Tab 6, Subtab 4bb, Vol. 5, the appellant's Exhibit G at 2. That morning, Plourde also issued a "Commander's Direct Order" directing Ms. Sawyer to reveal the name of the person who had called her and told her she was going to be fired, and Ms. Sawyer identified the appellant. *Id.*, Subtab 4w at 10, Vol. 5, the appellant's Exhibit G at 3-4.[3]

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[3] The record does not indicate whether Plourde issued the appointment letter before or after Ms. Sawyer revealed that the appellant was the person who had told her she was going to be fired; however, the record does indicate that Plourde decided to have an investigation before learning who told Ms. Sawyer she was going to be fired. IAF, Tab 22, agency Exhibit 7 at 3.

¶12 The investigation began the following day, June 22, 2005, and Scantlebury telephoned the appellant that morning to schedule a time to discuss the situation involving Ms. Sawyer. IAF, Tab 22, agency Exhibit 9 at 2, Tab 6, Subtab 4w at 2. The appellant, accompanied by Roy Rogers, the acting local union president, came to the conference room where Scantlebury was working. IAF, Tab 28, Subtab HH at 44, lines 21-24. After Scantlebury again explained why she wanted to speak with him, the appellant questioned her credentials as an investigator and stated that he would not speak with her until she gave him a copy of the appointment letter from Plourde, which Scantlebury refused to do without Plourde's consent. IAF, Tab 6, Subtab 4w at 2.

¶13 Later on that day, the appellant and Mr. Rogers met with Plourde, who had learned of the appellant's refusal to cooperate in the investigation and prepared a Letter of Direction instructing him to cooperate with the inquiry that Scantlebury was conducting. IAF, Tab 6, Subtab 4aa, Vol. 5, the appellant's Exhibit G at 10. At the meeting, Plourde orally directed the appellant to cooperate in the investigation and handed him the June 22, 2005 Letter of Direction as well as a copy of the appointment letter that the appellant had requested from Scantlebury. IAF, Tab 6, Subtab 4x at 1, Tab 22, agency Exhibit 7 at 5, the appellant's Exhibit K at 5. In response, the appellant stated that the Letter of Direction was an illegal order and left Plourde's office. IAF, Tab 6, Subtab 4d

at 9, Tab 22, agency Exhibit 7 at 5-6, the appellant's Exhibit K at 5.

¶14 The appellant then sent e-mails to DCMA Director Major General Darryl A. Scott, DCMA East Director Keith Ernst, and Daniel P. Meyer of the DoD IG's office alleging that Plourde's Letter of Direction was an illegal order and accusing her of abuse of authority, threatening a federal witness, and witness tampering, IAF, Vol. 5, the appellant's Exhibit H at 1, 4, 11. The appellant explained in his deposition that he believed that the Scantlebury investigation would interfere with the investigation of the same matters that he believed would be investigated by the IG. IAF, Tab 18 (Agency Exhibit 5 at 51); IAF, Tab 28, Subtab HH at 51.[4] The appellant stated "Did I just blatantly not agree – cooperate with her [Scantlebury] based on the fact that I had suspicions? No, I turned it over to the Inspector General and I wanted an independent look at this from an outside organization." *Id.* at 53.

¶15 On June 30, 2005, Scantlebury sent the appellant an e-mail message stating that she was wrapping up her investigation and needed to know whether he still intended not to speak with her. IAF, Tab 6, Subtab 4w at 6, the appellant's Exhibit H at 19. The record indicates that the appellant received

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[4] Both parties submitted the entire transcript of the appellant's deposition into the record. For that reason, the Board has credited the deposition testimony as it would a stipulation by the parties. We find it noteworthy that both parties submitted many of the same documents into the record.

and read this e-mail but did not respond to it. *Id.*, Subtab 4w at 7. On July 5, 2005, Scantlebury reported the results of her investigation to Mr. Ernst. *Id.* at 1-3, Tab 22, agency Exhibit 7 at 6.

¶16 During the first week of July 2005, the appellant told Mr. Thomas that he was targeted for firing. IAF, Tab 22, agency Exhibit 7 at 6. On July 12, 2005, Mr. Thomas wrote Plourde a letter in which he stated, "I am hearing rumors and information from very reliable sources to collaborate [sic] those rumors that I have been targeted for 'firing' for some time." IAF, Tab 6, Subtab 4v at 2. He asked Plourde whether he was targeted for firing and, if so, what he could do to protect himself. *Id.*

¶17 Because of this information, Plourde stated in her affidavit that she decided to request an investigation into this additional matter and, on the advice of counsel, she elevated the matter to Mr. Ernst, who issued a memorandum appointing Scantlebury to conduct a new investigation into the circumstances leading Ms. Sawyer and Mr. Thomas to believe that the agency was going to fire them. IAF, Tab 22, agency Exhibit 7 at 6-7, Tab 6, Subtab 4u.

¶18 Scantlebury received Mr. Ernst's appointment memorandum on August 1, 2005. IAF, Tab 6, Subtab 4j at 1. The following day, she sent the appellant an e-mail message seeking to interview him in conjunction with her investigation. *Id.* at 11, the appellant's Exhibit J at 3. In response, the appellant sent Scantlebury e-mail messages questioning the authority for

the investigation and notifying both Scantlebury and Mr. Ernst that he considered the investigation reprisal. IAF, Tab 6, Subtab 4j at 19, 21, the appellant's Exhibit J at 4-7. He stated "[t]he DoD IG already has an investigation in this area and I have already provided the information I have to them." *Id.* Scantlebury forwarded the appellant's messages to Ms. Owens for assistance in gathering information and providing a response. *Id.*, Subtab 4j at 1.

¶19 At about the same time, Ms. Owens exchanged a number of e-mail messages with the IG regarding the Scantlebury investigation. IAF, Tab 15 (Exhibits 1-4). The IG expressed concern over "how two investigations can proceed, and what does a witness in one (ours) say to your investigator if disclosing information will affect the OIG DOD investigation." *Id.* (Exhibit 1). The IG stated further that he had "urged Pedeleose and Hagel to cooperate, and to answer questions that they feel will compromise the OIG investigation by referring the matter to us; we can then decide, and not have two witnesses setting OIG policy (which is my fear)." *Id.* The IG informed Ms. Owens: "Though it is perhaps beyond my portfolio, be careful of the Congressional end of this case – which has been quiet for a while. Grassley and McCain are interested in the issues Pedeleose is perceived as advancing, so you may want to make sure your liaison is in the loop when the Colonel's investigation goes ahead." *Id.* (Exhibit 3). He also stated that, after he reviewed the questions that Scantlebury expected to ask the appellant, "on their face, [he saw] no conflict

between [his] investigation and [Scantlebury's]." *Id.* (Exhibit 4).

¶20 On August 19, 2005, Scantlebury was provided a new letter of appointment from Mr. Ernst, along with documents that addressed the appellant's questions regarding Scantlebury's authority to conduct investigations and administer oaths.[5] However, on the advice of Ms. Owens, Scantlebury delayed contacting the appellant until additional information was received from the office of the U.S. Attorney for the District of Atlanta. *Id.* at 2. By August 2, 2005, the U.S. Attorney authorized Scantlebury to communicate to the appellant that he would not be subject to a criminal proceeding for any responses that he may give, except for providing a false answer. IAF, Tab 6, Subtab 4j at 20.

¶21 On September 7, 2005, Scantlebury had a number of exchanges with the appellant. He asked why she had not answered his questions. She gave the appellant a package of information that contained the following documents detailing her authority to conduct the investigation: the August 19, 2005 letter

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[5] Although it is unclear from the record specifically which documents were attached to the August 19, 2005 new letter of appointment, other than two lists of questions – one for the appellant and one for Henry Hagel, another DCMA LMM employee – IAF, Tab 6, Subtab 4j at 73-78, the documents referenced in that appointment letter were 5 U.S.C. §§ 301, 302, DoD Directive 5105.64, and Delegation of Authority to Administer Oaths. *Id.* at 73.

of appointment as AR 15-6 Investigating Officer, IAF, Tab 6, Subtab 4j at 73-74, Vol. 5, the appellant's Exhibit Q at 3-4; a list of specific questions for the appellant, IAF, Tab 6, Subtab 4j at 75-76, Vol. 5, the appellant's Exhibit Q at 16-17; an August 18, 2005 letter with the subject line Delegation of Authority to Administer Oaths, *id.* at 5, and DoD Directive 5105.64 (establishing the DCMA), IAF, Tab 6, Subtab 4dd, Vol. 5, the appellant's Exhibit Q at 6-13. The letter of appointment states that Scantlebury may ask "follow-on questions if warranted." Although Scantlebury must have been aware of the e-mail communications with the IG because the IG reviewed the questions that she would be asking the appellant, there is no evidence that Scantlebury showed the appellant those e-mail communications or otherwise informed him that the list of questions had been approved by the IG.

¶22 The following day, September 8, 2005, Plourde issued the appellant a Letter of Direction ordering him to meet with Scantlebury on September 12, 2005, and "to fully cooperate and answer all questions posed by Scantlebury as part of her inquiry." IAF, Tab 6, Subtab 4n. In his deposition, the appellant stated that just before Plourde gave the appellant the Letter, he told her that he had turned over to the IG the information that he had about the subject matter of the investigation and asked her to go to the IG to talk to them about the investigation. IAF, Tab 28, Subtab HH at 123. Plourde did not respond to the appellant's request and handed him the Letter. *Id.* There is no

indication in the record that Plourde told the appellant that the IG had reviewed a specific list of questions and that the IG believed that on their face the questions would not interfere with his investigation, that Scantlebury would be limited to asking those questions notwithstanding the statement in the letter of appointment that she could ask "follow-on questions," or that the appellant could seek the advice of the IG if he believed that a "follow-on question" would interfere with the IG's investigation in the same matter.

¶23 The appellant also consulted with the IG and stated in his deposition that the IG told him to cooperate with lawful investigations. The appellant stated further that, when he specifically asked whether this investigation was lawful, the IG replied that he had no idea. *Id.* at 130-31.

¶24 Shortly before the time of the scheduled interview, the appellant gave Scantlebury two letters from Senator Charles Grassley, Chairman of the Senate Finance Committee, dated April 26, 2004, *id.*, Subtab 4j at 85, and August 16, 2005, *id.* at 84, which cited the assistance the appellant had provided the committee in its investigation of the C-130J program and quoted 18 U.S.C. § 1505, a criminal statute that protects those who are assisting in a Congressional investigation from retaliation. The appellant then read a statement accusing Scantlebury of conducting an illegal investigation, impersonating an investigator, making false statements concerning an investigation, interfering with a DoD IG investigation, and using

government time and equipment to conduct a "false" investigation. *Id.* at 83. He then "respectfully" declined to participate in the interview. *Id.*

¶25 On September 20, 2005, Scantlebury sent the appellant an e-mail message stating that she was trying to conclude her investigation and requesting that he contact her by close of business that day to schedule an interview. IAF, Tab 6, Subtab 41. The e-mail does not inform the appellant of the opinion advanced by the IG regarding the written questions that Scantlebury would pose to the appellant and does not indicate that Scantlebury's interview would be limited to those questions. As noted above, there is no evidence of record to show that Scantlebury informed the appellant of such. The appellant did not contact Scantlebury to schedule an interview. *Id.*, Subtab 4j at 3. Scantlebury reported the results of her second investigation to Mr. Ernst on September 27, 2005. *Id.* at 1-4.

The agency failed to prove the charges.

¶26 As noted, based on the foregoing exchanges between the appellant, Scantlebury, and Plourde, the agency suspended the appellant for 30 days on three charges: (1) refusal to cooperate in an agency investigation; (2) insubordination for refusal to follow instructions to cooperate in an agency investigation; and (3) failure to follow instructions of September 12, 2005, to meet with Scantlebury regarding an agency investigation. Initial Appeal File (IAF), Tab 6,

Subtabs 4a, 4b, 4e. Thus, all of the charges are specifically related only to the appellant's non-cooperation with the Scantlebury investigation.

¶27 Generally, an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances. The Board has defined one example of those limited circumstances, situations where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); IAF, Tab 19 at 2. The Board has not had occasion to define additional circumstances that provide exceptions to the general rule, although the Board's reviewing court has found that the agency and the Board must consider surrounding circumstances, including the appellant's reservations regarding the legality of the instruction, in disciplining an employee for failure to obey an order, particularly where, as here, the employee has no prior misconduct. *See Brown v. Department of Justice*, 31 M.S.P.R. 211 (!986) [sic], *citing Brown v. Department of Justice*, 790 F.2d 89 (Fed. Cir. 1986) (Table).

¶28 Two considerations underlie the "obey now, grieve later" rule: (1) the agency and its mission may be harmed by the employee's failure to act; and (2) the employee may be mistaken in his belief.

Therefore, cases where employees are disciplined for breaking the rule usually involve investigations of potential crimes and serious misconduct. *See, e.g., Weston v. Department of Housing & Urban Development*, 724 F. 2d 943 (Fed. Cir. 1983); *Negron v. Department of Justice*, 95 M.S.P.R. 561 (2004); *Larry v. Department of Justice*, 76 M.S.P.R. 348 (1997); *Pope v. Department of the Navy*, 63 M.S.P.R. 51 (1994).

¶29 None of these considerations are present in this case. The agency concedes that the Scantlebury investigation did not involve any potential crimes or even misconduct meriting discipline. It was an inquiry into rumor spreading, nothing more. The agency provides no evidence of harm due to the appellant's lack of full cooperation. Further, the e-mails from the IG show that it is uncertain whether the appellant was mistaken in his belief that the investigation, if not illegal, might conflict with the IG's investigation into similar matters.

¶30 Considering the circumstances surrounding the Scantlebury investigation as well as the facts that it did not involve a potential crime or serious misconduct and the absence of evidence that the appellant's failure to fully co-operate caused harm to the agency or its mission, we find that an exception to the "obey now, grieve later" rule is warranted in this case. In so finding, we stress that the appellant raised legitimate concerns about the investigation in which he was initially asked and ultimately ordered to participate. He sought the advice of the IG and did not get a definitive answer about whether the

investigation was lawful. Further, the appellant supplied to the IG the information that Plourde sought through the investigation conducted by Scantlebury. *See, e.g.*, IAF, Tab 28, Exhibit F at 5-8. He informed Plourde and Scantlebury on more than one occasion during the investigation that he had given the information that they sought to the IG.

¶31 As noted, agency officials also took steps to determine whether the agency investigation might conflict with any investigation of the same or similar issues by the IG. The agency submitted to the IG a list of questions that it planned to ask the appellant. The IG indicated that "on their face" none of the written questions would interfere with his investigation into the appellant's allegations. However, there is no evidence that Plourde or Scantlebury informed the appellant of the steps that the agency had taken to coordinate the two investigations.[6] This failure

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[6] One of the emails sent by the IG to Ms. Owens asserted that the IG had urged the appellant to cooperate with the investigation and to refer any questions he felt would compromise the IG investigation to the IG. This was apparently an oral communication and the appellant made no reference to it in his deposition. The only reference that the appellant makes to an oral communication with the IG is that the IG told him to cooperate with a lawful investigation but could not say whether the Scantlebury investigation was lawful. Regardless of what the IG orally communicated to the appellant on one occasion, there is no evidence that Ms. Owens, Scantlebury, or Plourde informed the appellant that the list of questions Scantlebury wished to ask had been approved by the IG or that the IG and the agency had agreed upon a means to proceed with both investigations,

(Continued on following page)

contrasts with the fact that Scantlebury, with Plourde's knowledge, informed the appellant of the actions that the agency had taken to consult with the U.S. Attorney. *See* IAF, Tab 28, Exhibit O at 7. Further, this failure appears disingenuous against the backdrop of the appellant's repeated statements of concern to Plourde and Scantlebury about the potential conflict with the IG's investigation. By not conveying the IG's views to the appellant, Plourde and Scantlebury essentially cut off the means by which the appellant could have complied with their investigation and orders without fearing interference with the IG's investigation.

¶32 Under the circumstances of this case, we find that the agency failed to prove its charges. Because the appellant supplied the relevant information to the IG, repeatedly informed Plourde and Scantlebury that he had done so, and consulted with the IG to learn that it was unclear whether giving the relevant information to Scantlebury would interfere with the IG's investigation, and because no one involved with the agency's investigation gave the appellant the information that would have allowed him to cooperate in the investigation in the manner that Plourde ordered, we find that the agency did not establish its charges by a preponderance of the evidence.

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despite the appellant's repeated protests about the potential conflict between the investigations.

The appellant established a prima facie case of whistleblowing.

¶33 In support of his whistleblowing claim, the appellant alleged that he made numerous protected disclosures.[7] Considering the disclosures asserted by the appellant who is pro se, and the evidence he submitted into the record, we find that one of the appellant's allegations of protected disclosures lies at the heart of this appeal: that threatening to fire VanDerbeck, who had also made protected disclosures regarding the safety of the C-130J program, was a violation of the WPA and an abuse of authority.

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[7] Specifically, the appellant alleged that he made the following protected disclosures: (1) a May 16, 2005 report titled "Cover-up in the Department of Defense," IAF, Tab 28, Exhibit D at 4-55, that the appellant sent to the DoD IG and Senator Grassley, *id.* at 1-2; (2) a June 15, 2005 DoD IG affidavits (with enclosures) discussing DCMA LMM management's alleged intentions to terminate VanDerbeck, IAF, Tab 28, Exhibit F at 6-13, which the appellant also sent to Senator John McCain's office, *id.* at 14, 16-23; (3) a June 20, 2005 e-mail message from the appellant to Mr. Meyer forwarding a June 16, 2005 e-mail message summarizing a conversation about DCMA LMM management's alleged intentions to terminate Susan VanDerbeck, *id.* at 29-31; (4) a July 7, 2005 DoD IG affidavit by the appellant (with enclosures), IAF, Tab 28, Exhibit I at 1-35; (5) a September 8, 2005 e-mail message to the DoD IG hotline with the subject line "Hit List and Targeted to be Fired" (with enclosures), *id.*, the appellant's Exhibit R; and (6) a September 19, 2005 e-mail message from the appellant to the DoD IG hotline with the subject line "Unlawful Investigations by the Defense Contract Management Agency" (with enclosures), IAF, Vol. 6, the appellant's Exhibit T.

¶34 A protected disclosure is one the appellant reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 5 (2000). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the WPA is whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *White v. Department of the Air Force*, 95 M.S.P.R. 1, ¶¶ 27-28 (2003). The U.S. Court of Appeals for the Federal Circuit emphasized in *Lachance* that this standard is an objective one: "A purely subjective perspective of an employee is not sufficient even if shared by other employees." 174 F.3d at 1381; *see White*, 95 M.S.P.R. 1, ¶ 28.

¶35 An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, including evidence that the official taking the personnel action knew of a disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1);

Easterbrook v. Department of Justice, 85 M.S.P.R. 60, ¶ 7 (2000).

¶36 The appellant alleged that Plourde violated the WPA and abused her authority by targeting certain DCMA LMM employees, notably VanDerbeck, for termination. As noted, the appellant alleged that Plourde's alleged intention to fire and ultimate firing of VanDerbeck, who had made disclosures of safety issues regarding the C-130J, was a violation of law and was an abuse of authority because it threatened VanDerbeck's career. He also alleged that the investigation Plourde initiated into the rumors concerning the termination of employees was an abuse of authority.

¶37 An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001). There is no de minimis standard for abuse of authority as a basis of a protected disclosure under the Whistleblower Protection Act. *Murphy v. Department of the Treasury*, 86 M.S.P.R. 131, ¶ 6 (2000). Harassment or intimidation of other employees may constitute an abuse of authority. *Id.* A supervisor's use of his or her influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he or she disagrees constitutes abuse of authority. *Id.*

¶38 Here, we must determine whether the appellant had a reasonable belief that his disclosures revealed either a violation of law or abuse of authority in the form of harassment or intimidation of other employees, or a supervisor's use of influence to denigrate other staff members and to threaten the careers of staff members. As noted the test is whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the appellant, could reasonably conclude that the actions the appellant's supervisors constituted an abuse of authority.

¶39 As discussed above, in early June 2005, the appellant helped VanDerbeck file a complaint with the DOD IG alleging 14 safety violations in the C-130J program. IAF, Tab 28, Exhibit E. The appellant's e-mail to the IG of VanDerbeck's complaint was copied to Plourde. VanDerbeck's disclosures followed closely on the Air Force's decision, notwithstanding the IG report, quoted above, to keep the C-130J program. Also in June 2005, the appellant received information that Plourde said, in response to a discussion about the system safety issues that VanDerbeck was raising, that since VanDerbeck was a probationary employee all they had to do was fire her. Additionally, the appellant had worked closely enough with VanDerbeck to be able to judge the quality of her work and he believed that she was a good engineer. In his deposition, the appellant stated, "I mean, I've heard her [VanDerbeck] describe things on the C-130J that are absolutely brilliant, as far as

electrical systems, distribution and all this." IAF, Tab 28, Deposition at 63. Thus, the appellant had a reasonable belief that Plourde knew of VanDerbeck's safety disclosures and that VanDerbeck was a competent employee with knowledge of the C-130J. Under all of these circumstances, we find that the appellant had a reasonable belief that Plourde had been correctly quoted regarding firing VanDerbeck and that Plourde's statement exhibited a violation of the WPA and an abuse of authority.

¶40 The appellant also established by preponderant evidence that his protected disclosure was a contributing factor in his suspension. Because the agency's investigation of the rumor that employees would be terminated began on June 22, 2005, soon after the appellant sent the June 2005 e-mail to the DoD IG, which was copied to Plourde, we find that the appellant has satisfied the timing prong of the knowledge/timing test. *See Russell v. Department of Justice*, 76 M.S.P.R. 317, 323 (1997). Further, the appellant established that the deciding official in this case, DCMA East Deputy Director Steven T. Bogusz, had knowledge of his allegation that Plourde violated the law and abused her authority by targeting VanDerbeck. In his response to the notice of proposed suspension, the appellant detailed his accusation that Plourde had targeted employees to be fired. IAF, Tab 6, Subtab D at 9. Among the items that the appellant submitted in his response to the notice of proposed suspension was an e-mail from Plourde to the appellant in which she states "[you state that Scantlebury's

investigation was initiated as a result of the termination of Ms. Susan VanDerbeck. Your statement is inaccurate. . . . The investigation was neither responsive to, nor directed at, any action involving VanDerbeck."[8]

The agency failed to show by clear and convincing evidence that it would have taken the same action absent the appellant's disclosure of his reasonable belief that Plourde's threat to terminate VanDerbeck was a violation of law.

¶41 As we stated above, once an appellant has established that a protected disclosure was a contributing factor in the contested personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. § 1221(e)(1), (2); *see Horton v. Department of the Navy*, 66 F. 3d 279, 284 (Fed. Cir. 1995). Clear and convincing evidence is

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[8] Because we have found that the appellant made a prima facie case of whistleblowing with regard to his disclosure that threatening to fire Susan VanDerbeck was a violation of law and an abuse of authority, we find it unnecessary to determine whether he made a prima facie case of whistleblowing with regard to his disclosures that management allegedly violated law and abused its authority by targeting employees other than VanDerbeck for firing and that the investigation of rumors that certain employees within the appellant's command were being targeted for termination constituted a violation of law and an abuse of authority.

that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence. 5 C.F.R. § 1209.4(d).

¶42 In determining whether an agency has met its burden by clear and convincing evidence,[9] the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Because the action

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[9] Noting that the Board may resolve these merits issues in any order it deems most efficient, the administrative judge proceeded directly to the issue of whether the agency established by clear and convincing evidence that it would have suspended the appellant for 30 days in the absence of any whistleblowing. ID at 4-5. Member Sapin would find that, if the administrative judge assumes that the appellant has made a prima facie showing and proceeds to a determination of whether the agency has met its clear and convincing burden, the administrative judge must inform the appellant of the factors used to decide whether the agency had met its burden and, importantly, that the appellant may present evidence that is relevant to that standard. *See Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 21 (2005) (the Board remanded the appeal to allow the testimony of a witness, denied by the administrative judge, whose testimony was relevant and material to whether the agency proved by clear and convincing evidence that it would have suspended the appellant absent her whistleblowing).

taken by the agency officials must be weighed in light of what they knew at the time they acted, in determining whether an agency has met its burden of rebutting the appellant's prima facie case by clear and convincing evidence, the Board must assess the evidence as it stood at the time the officials acted. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

¶43 Here, for the reasons that we found that the agency did not prove its charges, the strength of the agency's action is weak. The record also shows that Plourde, who as the proposing official was involved in the agency action, had a motive to retaliate against the appellant. The motive to retaliate can be inferred from the fact that the alleged wrongdoer knew of the allegations of wrongdoing directly. *See Russell*, 76 M.S.P.R. at 326-328. Plourde was aware of the appellant's allegations. She was aware that the appellant assisted VanDerbeck in her whistleblowing activity, and that, after the agency terminated VanDerbeck, he represented her in her EEO complaint. Plourde knew that the appellant believed that she had violated the law and abused her authority in threatening to fire VanDerbeck. As noted, in his response to the notice of proposed suspension was a copy of an e-mail from Plourde to the appellant in which she states "[y]ou state that Scantlebury's investigation was initiated as a result of the termination of Ms. Susan VanDerbeck. Your statement is inaccurate. . . . The investigation was neither responsive to, nor directed at, any action involving VanDerbeck." IAF, Tab 6, Subtab D at 173.

¶44 Plourde was also well aware of the appellant's contribution to Congressional investigations into the C-130J program, investigations which resulted in a report calling for the termination of the C-130J, the program that she was charged with administering. The appellant's participation in those investigations was widely known at DCMA. The IG had cautioned Owens in an e-mail that Senators Grassley and McCain were interested in the issues the appellant was perceived as advancing. IAF, Tab 15, Exhibit 3. Further, the appellant had given Scantlebury two letters from Senator Grassley citing the assistance the appellant had provided the Senate Finance Committee in its investigation of the C-130J program.

¶45 Plourde's motive to retaliate is also inferred from the shifting reasons that she gave to conduct the investigation. On one hand she said that there was no basis for the rumors and the investigation was because the rumors were having a negative effect on employee morale. IAF, Tab 22, Exhibit 7 at 3. Yet, as we quoted above, in her affidavit, Plourde stated "I was concerned that one of my supervisors was inappropriately discussing confidential management information with subordinates and that this conduct was feeding rumors that certain employees were targeted to be fired." *Id.* at 4. Plourde's statement and actions imply that she had a real concern that information that she wanted kept confidential was leaking to employees and that she wanted to get to the ultimate source of that leak. The force of her actions after she traced the rumors to the appellant implies

that she had a motive to retaliate against the appellant, who published the allegation of her violation of law and abuse of authority and would not provide her the information that she wanted.

¶46 Plourde's motive to retaliate is further evidenced in the fact that she did not inform the appellant that the IG approved the questions for the Scantlebury investigation and what recourse he had if he believed that additional questions would interfere with the IG investigation. The appellant repeatedly told Plourde and Scantlebury that he had given the information they sought to the IG and that he was concerned that their investigation would interfere with that of the IG. Nevertheless, neither Plourde nor Scantlebury told the appellant that they had consulted the IG and worked out a means of coordinating the two investigations. Plourde's failure to inform the appellant of the means to resolve his expressed concerns about the investigation compels the inference that her purpose in questioning the appellant was not simply to gather information, but instead to force the appellant into a failure to cooperate with the investigation, thereby providing the means to punish him for making protected disclosures about her threat to terminate VanDerbeck.

¶47 Finally, there is no evidence regarding whether the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated; therefore, we find that the agency has failed to meet its significant statutory burden of proof to show by clear and convincing evidence that it

would have disciplined the appellant absent his whistleblowing. Thus, corrective action is mandated. 5 U.S.C. § 1221.[10]

ORDER

¶48 We ORDER the agency to cancel the appellant's 30-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶49 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the

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[10] In his PFR, the appellant also asserts that the administrative judge erred in finding that the appellant failed to prove retaliation for participation in the EEO process, erred in finding that the appellant failed to prove harmful procedural error, and that the administrative judge was biased. We find that the appellant failed to show error by the administrative judge in these regards and failed to show that the administrative judge was biased.

appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶50 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶51 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶52 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made

within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

¶53 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid,

you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.202 [sic] and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then

you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the [sic] Board's decision without regard to your discrimination claims,

you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Kenneth M. Pedeleose v. Department of Defense

MSPB Docket No. AT-0752-06-0350-I-1

¶1 I do not agree with the majority opinion, for three reasons.

I. THE CHARGES

¶2 I would not make an exception to the obey-now-grieve-later principle for purposes of this case. As the majority acknowledges, it is well-established that an employee must obey an instruction from a superior, even if he disagrees with it, and grieve the propriety of the instruction later. *See Larson v. Department of the Army*, 91 M.S.P.R. 511, ¶ 21 (2002). Exceptions to the so-called obey-now-grieve-later rule have been recognized only in unusual cases. For instance, an employee is not required to obey an unlawful instruction, *Harris v. Department of the Air Force*, 62 M.S.P.R. 524, 529 (1994), nor must an employee

follow an order if doing so would put him in danger of serious harm, *Nickerson v. U.S. Postal Service*, 49 M.S.P.R. 451, 459 (1991). Additionally, an employee cannot be forced to follow an order that would result in his surrender of a constitutionally-protected right. *Wiley v. Department of Justice*, 89 M.S.P.R. 542 (2001), *rev'd on other grounds*, 328 F.3d 1346 (Fed. Cir. 2003).

¶3 This case is unlike any of the extreme situations just described and does not warrant a further exception to the obey-now-grieve-later principle. Indeed, according to the majority, the agency's investigation, with which the appellant was explicitly instructed to cooperate, "was an inquiry into rumor spreading, nothing more." The appellant was simply mistaken in thinking that the agency had no right to ask whether he was spreading rumors in the workplace that certain employees had been targeted for firing. The fact that the appellant had previously speculated in a communication to the Inspector General (IG) that the agency was going to fire an employee for an illegitimate reason did not give him license to stonewall investigators outside of the IG's office, who were trying to find out who was upsetting and distracting certain employees. *See* Initial Appeal File (IAF), Tab 6, Subtab 4J at 75-76. While the IG may have been looking into whether the agency had committed or was about to commit illegal retaliation, the IG was not investigating rumor-mongering, and the appellant could not have reasonably believed that he was. Thus, the appellant's supposed concern that the

investigators who wanted to question him about the rumors would interfere with an IG investigation was unfounded.

¶4 It is also noteworthy, as the majority acknowledges, that after the appellant's first refusal to answer questions about rumor-spreading, he informed the head of the agency and the IG that forcing him to answer the questions would interfere with an IG investigation. IAF, Vol. 5, Ex. H at 1, 4, 11. When agency officials returned a few weeks later to ask again about the rumors, it must have been clear to the appellant that neither the head of the agency nor the IG had shut down the investigation into the rumors. The appellant was not an agent of the IG, and he was not free to decide for himself that he must protect the prerogatives of the IG by continuing to refuse to answer questions.

¶5 Based on the foregoing, I would sustain the charges of refusal to cooperate in an investigation, insubordination, and failure to follow instructions.

II. THE APPELLANT'S DISCLOSURE

¶6 I do not agree that the appellant made a protected disclosure to the IG. According to the majority, in early June 2005, "the appellant received information that [Colonel] Plourde said, in response to a discussion about the system safety issues that [Susan] Vanderbeck was raising, that since Vanderbeck was a probationary employee all they had to do was fire her." The majority goes on to state that the

appellant knew Vanderbeck to be a competent employee, and that he reasonably believed that Plourde was aware of the disclosures Vanderbeck had made. On this basis, the majority concludes that when the appellant told the IG that the agency intended to terminate Vanderbeck's appointment in retaliation for what he considered to be her protected whistleblowing activity, he made a protected disclosure under 5 U.S.C. § 2302(b)(8) of a violation of law and an abuse of authority.

¶7 In fact, the evidence shows that the appellant's disclosure to the IG concerning Vanderbeck was not protected. In his June 15, 2005 disclosure, the appellant merely repeated what DeAngeles Davis supposedly had heard from LaNorma Shelton-Thomas, who in turn had heard something from Myra Tate about a meeting Tate had attended with Plourde. In other words, by the appellant's own account, the appellant's belief that Plourde intended to terminate Vanderbeck's appointment for an illegitimate reason was fourth-hand information about what was said in a meeting that the appellant did not attend. *See* IAF, Vol. 5, Ex. F at 1. Moreover, the appellant sent a message to the IG less than two hours after the message that the majority finds was a protected disclosure, in which the appellant admitted that Shelton-Thomas herself characterized what she had said about Vanderbeck as a "rumor." *Id.* at 13.

¶8 It is also significant that a day after the appellant made his disclosure to the IG, Davis informed the appellant that Vanderbeck was being considered

for termination because agency officials had received reports that Vanderbeck had taken a bicycle belonging to a contractor without permission, and had also made a bad impression on some of the contractor's employees when she was seen dancing in a restaurant on her lunch hour. *Id.* at 26. In other words, the appellant's supposed source for his belief that Vanderbeck had been targeted for termination because of her whistleblowing – a source who, like the appellant, was not present at the meeting where Plourde allegedly discussed her intention to fire Vanderbeck – actually thought that Vanderbeck was in jeopardy of losing her job for reasons unrelated to any protected activity on Vanderbeck's part.

¶9 A disclosure of information is protected if the individual making the disclosure "reasonably believes" he is revealing a violation of law, an abuse of authority, or one of the other situations described at 5 U.S.C. § 2302(b)(8). A disclosure based on unreliable or scanty information is not protected, *Special Counsel v. Spears*, 75 M.S.P.R. 639, 656 (1997), nor is a disclosure protected if it is based on an individual's purely subjective belief, *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Put differently, a disclosure that amounts to unsubstantiated speculation is not protected. *Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994). Here, although terminating a probationary appointment in retaliation for the probationer's protected whistleblowing would be a violation of law and an abuse of authority, when the appellant made his disclosure to the IG he did not

reasonably believe that the agency intended to terminate Vanderbeck's appointment because of her whistleblowing. As the discussion above shows, the appellant's disclosure to the IG was nothing more than unsubstantiated speculation. The appellant's subjective belief that Plourde intended to fire Vanderbeck for an illegitimate reason was not based on any reliable information, and accordingly, the appellant did not make a protected disclosure when he shared his supposition with the IG.

III. AGENCY'S AFFIRMATIVE DEFENSE

¶10 The majority finds that the appellant's June 15, 2005 disclosure to the IG contributed to the agency's decision to suspend the appellant for 30 days. When the Board finds that protected whistleblowing activity was a contributing factor in a personnel action, it must order corrective action unless the agency shows by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing. 5 U.S.C. § 1221(e)(2). Here, the majority concludes that the agency has failed to meet its burden. One of the key factors relied upon by the majority in reaching this conclusion is the fact that the agency did not prove its charges. As a result, the majority reasons, the evidence in support of the agency's decision to suspend the appellant must be deemed "weak."

¶11 I disagree with this analysis. The evidence in support of the agency's decision to suspend the

appellant is very strong; indeed, the evidence is uncontested. The majority creates an exception to the well-established obey-now-grieve-later principle for purposes of this case, so it can hardly be said that the charges upon which the suspension was based were flimsy or trumped-up. Again, I would sustain the charges, and I would not find that the appellant made a protected whistleblowing disclosure. If, however, I agreed with the majority that the charges could not be sustained and that the appellant made a protected disclosure that contributed to his suspension, I would assess the agency's arguments in support of its affirmative defense differently from the majority because at the time it acted the agency reasonably believed under prevailing law that it was entitled to discipline the appellant for the conduct described in the charges.

Neil A. G. McPhie Chairman